IN THE COURT OF APPEALS OF IOWA

No. 9-771 / 09-0652
Filed February 24, 2010

IN RE THE MARRIAGE OF ELIZABETH ZOGG-KELLETT AND CHRISTOPHER LEE KELLETT

Upon the Petition of
ELIZABETH ZOGG-KELLETT,
a/k/a ELIZABETH A. ZOGG,
a/k/a ELIZABETH ANNE ZOGG,
Petitioner-Appellant,

And Concerning
CHRISTOPHER LEE KELLETT,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Marlita A. Greve, Judge.

The mother appeals an order of the district court modifying a prior decree of dissolution and granting the father physical care of the children. **AFFIRMED AS MODIFIED AND REMANDED.**

Richard Davidson of Lane & Waterman, Davenport, for appellant.

Mark Neary, Muscatine, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

I. Introduction.

Elizabeth Zogg (Beth) appeals the district court's order modifying the parties' prior dissolution decree and granting Christopher Kellett (Chris) physical care of the parties' children. Beth challenges the district court's findings that there had been a substantial and material change of circumstances affecting the children and that Chris had the ability to provide superior care. Beth also appeals the district court's visitation award. Upon our de novo review, we affirm the district court's ruling regarding physical care, but modify summer visitation.

II. Facts.

Beth and Chris were married in 1997. They had two children in the marriage, Christian (born 1998) and Callie (born 2001). It is undisputed that Beth has been the primary caregiver for the children.

In 2004 Beth and Chris were divorced in Georgia. At the time of the dissolution, Chris was living in a suburb of Atlanta, and Beth was living in North Augusta, South Carolina. North Augusta is just across the border from Augusta, Georgia, and is about one hundred fifty miles from Atlanta.

The decree provided that Beth would have sole legal custody and physical care of the children. Chris received regular visitation every other weekend as well as summer and holiday visitation. In addition, the decree provided that if Chris "shall relocate his residence on a permanent basis to Augusta, Georgia," he would receive one weeknight of visitation per week. The decree also provided for a modified visitation schedule "[i]f either party moves so that the distance between the parties is more than 200 miles."

After the decree was entered in August 2004, Chris made plans to relocate to Augusta and actually signed an apartment lease. However, in October 2004, Beth moved with the children to Muscatine, where she had been raised. For about six months, Chris traveled by air from Georgia to see the children once a month.[1] In April 2005, Chris moved to Davenport and was able to resume the full amount of visitation provided in the dissolution decree. The following year, Chris relocated to Muscatine.

In September 2007, Chris filed the present application for modification of the Georgia dissolution decree, seeking sole legal custody and physical care of the children or, at a minimum, a modified visitation schedule. Shortly after filing this application, Chris moved from Muscatine to Ankeny. He testified later that this move was "part work related" but that he also followed the recommendation of the psychologist who evaluated both Beth and himself. According to Chris, the psychologist said that "you may ease things up if you were to not be right on top of her here in Muscatine."[2] However, in December 2008, Chris had an opportunity to make a lateral move within his company and returned to Muscatine. At that point, Chris leased a three-bedroom apartment in the center of town. Chris was receiving visitation every other weekend (including Friday, Saturday, and Sunday nights) as well as Monday overnight visitation on the weeks when he did not have weekend visitation.

[1] Beth paid half of Chris's travel expenses.

[2] The psychologist, who testified at the modification hearing, did not recall giving this advice. Chris's supervisor testified that to his knowledge, the move was purely job-related.

In February 2009, the modification proceeding went to trial.[3] An attorney was appointed for the children pursuant to Iowa Code section 598.12 (2007). She participated in the hearing and advised the court that the children want to spend more time with their father.

At trial evidence was presented that there had been four reports of child abuse against Chris, all of which were ultimately "not confirmed," and one report of child abuse against Beth, also classified as "not confirmed."

A child welfare specialist testified that she became involved with Beth, Chris, and the children following one of the reports against Chris. She testified that from her observation, Chris's parenting was appropriate, but that Beth had inappropriately encouraged the children to be fearful of their father.

A psychologist, Dr. David McEchron, who had been requested to do an evaluation of both parents by the Iowa Department of Human Services (DHS), also testified. Dr. McEchron had performed these evaluations in March/April 2007, approximately two years before trial. His testing showed that Chris could at times be "aggressive" and "impulsive" but "I don't see him as putting the kids at risk." His evaluation of Beth showed her to be "evasive," "passive-aggressive," and someone who was making a "conscious effort" to turn the children against their father. Dr. McEchron did not see Beth as being as supportive as Chris of the children's relationship with the other parent.

A DHS worker testified on Chris's behalf. She explained that in the course of investigating the family, she had the opportunity to interview the children. Both

[3] Chris had previously moved to continue the modification proceeding, without opposition from Beth.

children communicated to her that their mother seemed disappointed when the children had a good time with their father. The children would be anxious and fearful when they left Beth's place for Chris's, apparently because of things Beth had said.[4] This employee recalled an instance where the DHS workers could overhear Beth telling Callie to say that her father scared her. At the time of the hearing, however, this worker had been placed on administrative leave by DHS due to this case. A former colleague of this DHS worker also testified. It was her impression when she was involved with Beth and Chris that Beth was "projecting" her fears onto the children.

Chris's supervisor testified that Chris's job allows him flexibility to schedule time around his children. Although Chris has travel within Iowa, it is generally not overnight travel.

Beth testified that the marriage broke up over Chris's temper. She testified that Chris had been physically abusive of her, never "beating her up," but punching her in her sleep, pinning her, and squeezing her arms. She testified that because of Chris's temper, "he could be dangerous to anyone." Beth's mother testified to specific instances of Chris's anger.

A psychologist who had been treating Beth, Dr. Elizabeth Lonning, also testified. Dr. Lonning offered the view that Beth was becoming better able to

[4] When Chris was a child, Chris's father murdered Chris's mother and grandfather. Subsequently, when Chris was an adult, Chris's father was executed for this crime by the State of Georgia. The DHS worker criticized Beth for discussing the murders with the children. However, when Christian was much younger and living in Georgia, Chris had arranged for Christian to visit with Chris's father in prison. Beth testified she told Christian about the murders, in an age-appropriate fashion, only after Christian asked what had happened to his paternal grandmother.

deal with the stress of dealing with the circumstances, including the pending modification proceeding.

In addition, a therapist named Philip Sepanski, who had been working with the children continuously since 2004, testified. He noted the children were doing better, but feared their father's disapproval whenever his wishes were not honored. Sepanski felt that Christian had legitimate concerns about Chris being hostile and abusive—concerns that had not been put into his head by Beth. Sepanski also related Callie's concerns regarding occasions when her father lost his temper.

Sepanski acknowledged making some of the reports to DHS regarding Chris that were ultimately categorized as "not confirmed." Sepanski also conceded that the children were regularly brought to their sessions by either Beth or her parents. Sepanski had sometimes spoken with Beth before or after the sessions, and had never spoken to Chris.

Contrary to what was reported by the children's attorney, Sepanski testified that the children had told him they were satisfied with the current visitation arrangement.

The evidence at the hearing indicated that Callie was doing well, but that Christian was a "fragile" child who had some issues paying attention in school. Christian's primary extracurricular activity is tae kwon do, which occupies him from 5:30 to 7:00 p.m. on four out of five weeknights. During this time, Beth is generally teaching in her Pilates studio, and relies on her parents for afterschool weekday care of the children.

Following the hearing, the district court entered a lengthy written ruling, in which it found that a substantial and material change of circumstances had occurred. It determined joint legal custody was appropriate (a point on which the parties agreed). It determined joint physical care was not feasible, that Chris would offer superior care, and that he should have physical care of the children. Finally, the district court awarded Beth visitation similar to that which Chris had been receiving when he was the noncustodial parent.[5] Beth appeals. She argues: (1) a substantial and material change of circumstances was not shown; (2) Chris would not offer superior care; and (3) the visitation schedule was inappropriate.

III. Standard of Review.

Our review of this modification proceeding is de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). We give weight to the fact findings made by the trial court, especially when we consider witness credibility, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). Our overriding consideration is the best interests of the children. Iowa R. App. P. 6.904(3)(*o*).

[5] The court's decree also provided that "if Chris decides to move the children from Muscatine, the Court finds that would be a material and substantial change in circumstances warranting the Court to consider a modification of the custody arrangement."

IV. Merits.

A. Substantial and Material Change.

Modification is appropriate only when there has been a substantial and material change of circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the children. *Id.* The applicant also must carry the heavy burden of showing an ability to offer superior care. *Melchiori v. Kooi,* 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). "[O]nce custody of children has been fixed it should be disturbed only for the most cogent reasons." *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983).

In this case, the district court found a substantial and material change of circumstances based on Iowa Code section 598.21D, which provides:

> If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances. If the court determines that the relocation is a substantial change in circumstances, the court shall modify the custody order to, at a minimum, preserve, as nearly as possible, the existing relationship between the minor child and the nonrelocating parent.

Since North Augusta and Muscatine are more than one hundred fifty miles apart, and Beth's move to Muscatine led to Chris's relocation, the court relied on section 598.21D to find a substantial and material change of circumstances.

Beth argues that this was error, because the original Georgia decree anticipated the possibility of such a move. In fact, the decree expressly provided for modified visitation if "either party moves so that the distance between the

parties is more than 200 miles."[6] She also points out that her move did not affect the welfare of the children, because Chris also moved and was able to exercise just as much visitation as before. Chris was not a "nonrelocating parent." *See* Iowa Code § 598.21D.

These arguments raise a legal question: When a party relies upon section 598.21D to argue a substantial and material change of circumstances, must that party also prove (1) that the move was not contemplated when the original decree was entered and (2) that the move affects the welfare of the children—or can the move itself automatically reopen the issue of physical care, even when the other parent follows and is able to exercise the same visitation as before?

We ultimately conclude this question need not be answered, because we believe there was another (and in this case more meaningful) change in circumstances. According to the district court's detailed findings, Beth has undermined the children's relationship with their father by manipulating them into fearing him. As the district court found, "[Beth] is actually driving a wedge between these children and their dad." These findings, if correct, would constitute a substantial and material change of circumstances. *See In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa Ct. App. 1988) (finding the mother's attempts to deal with her frustrations with the father by "attempting to drive a wedge" between the children and their father constituted a substantial change in circumstances warranting a modification).

[6] Chris responds that the mere inclusion of such a provision in the decree should not operate as a waiver of a party's rights to claim a substantial and material change of circumstances. We are inclined to agree with Chris's position, but need not reach this issue, for reasons discussed below.

From our vantage point, reviewing only a paper record, we are unable to reach different findings. Certainly, there were conflicts in the testimony. Evidence was presented that Chris had anger issues and had engaged in physical abuse. However, the district court made an express determination that Chris was credible and Beth was not.[7] The district court accepted the testimony of the psychologist who evaluated the parents in 2007 (Dr. McEchron) while declining to accept the testimony of the therapist who had been seeing the children since 2004 (Mr. Sepanski). While we might have made different findings had we been the trier of fact, the district court heard the witnesses, and we did not. Since this particular case turns largely on the relative credibility of Chris and Beth, and more generally on their trustworthiness, we defer to the district court's findings and conclude that a substantial and material change of circumstances was established.

B. Superior Parenting.

Beth also argues that Chris failed to show he would offer superior care.[8] Again, the district court made detailed findings on this issue. It found "no credible evidence that Chris has any anger or temperament issues that would affect his ability to appropriately parent his children," while opining that Beth "needs therapy to target her manipulative behavior." The district court also observed that Chris is more available for the children after school than Beth, because she has a busy afternoon and early evening work schedule as contrasted with Chris's

[7] As the district court put it, "Beth's physical abuse claims are not credible."

[8] Beth does not argue for shared physical care. She contends, rather, that she should have continued to have physical care of the children because Chris would not provide superior care.

more flexible sales schedule. Additionally, Chris has a very large three-bedroom apartment which is suitable for the children.

We defer to the district court's findings about Chris's and Beth's behavior for the reasons we have already discussed. *See also In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992) ("In custody and physical care determinations, we are also mindful that the court must consider the denial of one parent of the child's opportunity to have meaningful contact with the other parent is a significant factor in determining the custody or physical care arrangement."). We agree with the district court's observations about schedules and living arrangements.

In our view, Christian is the crux of this case. The evidence appeared to be undisputed that he has a "fragile" personality and has been going through some difficulties in school and in his personal life. During the trial, two alternative explanations were offered for those difficulties: (1) he fears his father; or (2) his mother's manipulation has made him confused and afraid to get close to his father. The district court credited the latter explanation. For the reasons already noted, we defer to the district court on this point.

C. Visitation.

Finally, Beth challenges her visitation she received. The district court ordered visitation by the noncustodial parent on alternate weekends from Friday after school until Monday morning, one overnight during every week, and an additional four weeks (in two-week intervals) during the summer. Beth argues that she should have 180 days per year of visitation.

Chris contends that the visitation ordered by the district court is appropriate, pointing out that it is "all the visitation [Beth] proposed for the noncustodial parent." Beth did propose this schedule, but she said it was what the noncustodial parent should receive "at a minimum." Chris submitted a significantly different proposal for the summer months. His schedule would have allowed the noncustodial parent to have the children most of the summer: from the second full week after school is over until one week before school resumes, subject to the custodial parent receiving a two-week vacation period and visitation (as if he/she were the noncustodial parent) during that time. At oral argument, both Chris and Beth conceded that the record could potentially support more summer visitation for Beth than she actually received.

On our review, we believe Beth should receive the more generous summer visitation that Chris had proposed in his schedule. *See* Iowa Code § 598.41(1)(a) (stating "insofar as is reasonable and in the best interest of the child," the custody order including liberal visitation rights where appropriate shall "assure the child the opportunity for the maximum continuing physical and emotional contact with both parents"). Beth has been the primary caregiver for these children for their entire lives, and the record shows that she has ministered well to their needs, except (and this is an important exception) she has been found to have impeded their relationship with their father. Additionally, the physical proximity of the parties makes it practical for the children to spend increased time with their mother during the summer, with their father having frequent contact through the equivalent of noncustodial visitation. Christian's issues also appear to be manifesting themselves to a large extent in school,

making it appropriate for him to reside principally with his father during the school year, while allowing him to reside principally with his mother during the summer. From our review of the record, we believe that achieving somewhat more balance in the overall time that the children spend with each parent, through increased summer visitation with the mother, would be in the children's best interests.

Accordingly, we modify the summer portion of the visitation schedule as follows: Beth shall have continuous visitation commencing the beginning of the second full week after school is over and continuing until one week before school resumes, provided, however, that Chris shall have visitation during that time as if he were the noncustodial parent. Additionally, each parent shall have an uninterrupted two-week period with the children during the summer for vacation or other purposes. Chris shall notify Beth by May 1 of each year the dates such period is to be exercised; and Beth shall notify Chris by May 15.

Except as modified herein, we affirm the district court's decree. However, we also remand this case to the district court so that it may have the opportunity to modify child support if necessary. *See* Iowa Child Support Guidelines Rule 9.9 (extraordinary visitation credit). Costs of appeal shall be divided evenly between the parties.

AFFIRMED AS MODIFIED AND REMANDED.